

JUN 4 1984

ALEXANDER L. STEVENS,
CLERK

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No. 83-1862

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

LESLIE LUBIN,

Petitioner,

v.

THE BOARD OF EDUCATION OF THE CITY OF
NEW YORK and THE BOARD OF EXAMINERS OF
THE BOARD OF EDUCATION OF THE CITY OF
NEW YORK,

Respondents.

MEMORANDUM OPPOSING CERTIORARI

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This case involves a challenge to the administrative determination to terminate petitioner's services as a teacher of homebound children based on his failure to meet all of the eligibility requirements for the required license. In dismissing the proceeding, the Appellate Division, First Department, of the Supreme Court of the State of New York and the Court of Appeals of the



State of New York correctly concluded that, pursuant to the appropriate state statute of limitations and well-settled state case law, the proceeding was time-barred.*

As is clearly evident from the petition for a writ of certiorari, pp. 17-18, 20, this Court lacks jurisdiction to review the order of the Court of Appeals since the federal questions which the petition now seeks to raise before this Court were never properly raised, or even considered, in the state courts. See 28 U.S.C.A. §1257(3). The petition concedes that petitioner did not brief or argue the federal questions during the adjudication of his

*Since the New York Court of Appeals found that petitioner's action accrued on April 21, 1976, the day that he was informed that his services were being terminated for failure to meet the licensing requirements, petitioner's argument that the Court should have applied the three year statute of limitations of Section 214(2) of the New York Civil Practice Law and Rules (CPLR) instead of the four month statute of limitations of CPLR §217 is unavailing because petitioner's proceeding would still be time barred, the proceeding having been commenced on July 2, 1980, more than four years after its accrual date.



proceeding in the state court of original jurisdiction or before the state appellate courts prior to the determination of the two appeals. The petition further concedes that petitioner first raised the federal questions for which he now seeks this Court's review on a motion for reargument before the Court of Appeals, New York State's highest court, after that Court had already decided his appeal. The Court of Appeals denied that motion for reargument. In denying the motion for reargument and thus refusing to consider the new federal questions which petitioner has sought to raise, the Court of Appeals was following its well-settled rule that "A motion for reargument is not an appropriate vehicle for raising new questions, such as those now urged upon us, which were not previously advanced either in this Court or in the courts below." Simpson v. Loehmann, 21 NY2d 990 (1968) See, also, Matter of United States of America v. Schmuck, 293 N.Y. 768 (1944); Mississippi Shipbuilding Corp. v. Lever Bros. Co., 237 N.Y. 565 (1924); Reilly v. Steinhart,

218 N.Y. 660 (1916); Cohen and Karger, Powers of the New York Court of Appeals, pp. 628, 694-696.

The failure of petitioner to raise properly the federal questions for consideration in the state courts deprives this Court of jurisdiction to review the Court of Appeals' order. Monks v. New Jersey, 398 U.S. 81 (1970); see Hill v. California, 401 U.S. 796, 805 (1971); Street v. New York, 394 U.S. 576, 582 (1969).

Therefore, the petition for a writ of certiorari should be denied.

May 30, 1984

Respectfully submitted,

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